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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE, Plaintiff and Respondent, v. ABEL AJTUN, Defendant and Appellant.	B291125 (Los Angeles County Super. Ct. No. BA448397)

APPEAL from a judgment of the Superior Court of Los Angeles County, James R. Dabney, Judge. Affirmed.

Waldemar D. Halka, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Scott A. Taryle and Colleen M. Tiedemann, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Abel Ajtun appeals from a judgment of conviction entered after a jury trial for continuous sexual abuse, sexual battery, two counts of a lewd act upon a child, and three counts of forcible rape. Ajtun contends the trial court prejudicially erred in allowing evidence of uncharged sex offenses and instructing the jury it could consider the uncharged offenses as circumstantial evidence of Ajtun's guilt if the prosecution proved the uncharged offenses by a preponderance of the evidence. Ajtun also asserts the trial court committed prejudicial instructional error in failing to instruct on the elements of sexual battery under Penal Code[1] section 243.4, subdivision (d). Further, Ajtun argues substantial evidence does not support his convictions of the sex offenses charged in counts 1, 4, and 7.

In supplemental briefing, Ajtun contends the trial court violated his right to due process by failing to consider his ability to pay before imposing court assessments and restitution fines, relying on this court's opinion in *People v. Dueñas* (2019) 30 Cal.App.5th 1157 (*Dueñas*).

We affirm the judgment. We also reject Ajtun's constitutional challenges to imposition of the fines and assessments in light of Ajtun's failure to challenge the $10,000 restitution fines imposed at sentencing and evidence at trial of Ajtun's ability to pay $490 in court assessments.

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[1] All undesignated statutory references are to the Penal Code.

FACTUAL AND PROCEDURAL BACKGROUND

A. *The Information*

An amended information[2] charged Ajtun with continuous sexual abuse of a child under the age of 14 (§ 288.5, subd. (a); count 1); two counts of lewd act upon a 14- or 15-year-old child (§ 288, subd. (c)(1); counts 2 & 3); sexual battery (§ 243.4, subd. (d); count 4); assault with intent to commit a felony (rape) against a person under the age of 18 (§ 220, subd. (a)(2); count 5); and three counts of forcible rape of a child over 14 years old (§ 261, subd. (a)(2); counts 6, 7, & 8). As to counts 4 and 5, the information identified Casandra G. as the victim. The remaining counts identified S.C. as the victim. As to count 1, the information alleged the continuous sexual abuse occurred "[o]n or between March 21, 2011 and March 20, 2014." As to counts 7 and 8, the amended information alleged the rapes of S.C. occurred "[o]n or between March 21, 2016 and June 10, 2016." As to count 4, the information alleged Ajtun "willfully and unlawfully, for the purpose of sexual arousal, sexual gratification[,] and sexual abuse, cause[d] Casandra G. against his/her will . . . to masturbate and touch an intimate part of Casandra G." (Capitalization omitted.) As to count 5, the information alleged Ajtun "unlawfully assault[ed] Casandra G. . . . with the intent to commit rape, sodomy, [and] oral copulation." (Capitalization omitted.)

Ajtun pleaded not guilty.

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[2] Ajtun was initially charged on April 13, 2017 with counts 1 through 5. On May 3, 2017 an amended information additionally charged Ajtun with counts 6, 7, and 8.

B. *The Evidence at Trial*

1. *S.C.*

a. Count 1 (continuous sexual abuse)

S.C.'s mother, Betsy S. testified she met Ajtun in 2003 shortly after moving to the United States from Guatemala. Ajtun is the uncle of S.C.'s father. On several occasions Ajtun loaned Betsy money, especially after S.C.'s father[3] returned to Guatemala in 2012. Because Betsy did not have a car, Ajtun sometimes gave Betsy rides to work or to the grocery store and sometimes picked up S.C. and Betsy's other children from school. Ajtun brought Betsy's family prepared food twice a month. On these occasions, Ajtun sometimes requested S.C. join him to drive to see Ajtun's son or to collect money from Ajtun's friends. S.C. would then return about 30 minutes later. While S.C. was in middle school, at Ajtun's suggestion Betsy added him as S.C.'s emergency contact. Betsy also gave Ajtun a key to her house.

S.C. testified she saw Ajtun approximately once a week beginning when she was six. Over time, S.C. became close friends with one of Ajtun's sons. When S.C. was 11, she went to an amusement park with Ajtun, his two sons, and one of their friends. On the way home, Ajtun drove and S.C. sat in the front passenger seat. S.C. was wearing shorts. Ajtun reached over to S.C. and began massaging the bare inner thigh of her left leg. S.C. moved away from Ajtun toward the passenger door, and he stopped. Later on the drive Ajtun again began massaging S.C.'s bare thigh. S.C. moved away from Ajtun, and Ajtun stopped.

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[3] During her testimony Betsy referred to S.C.'s father as her husband and also as "my children's father."

When S.C. was 12, she was placed in foster care for seven months. S.C. then returned to live with her mother. After a few months, S.C. started to see Ajtun again. She began to work at Ajtun's party supply store during holidays. Ajtun and S.C. were sometimes alone together at the store. One night, while she was still 12, S.C. and Ajtun were alone together in Ajtun's car to make a party supply delivery. Ajtun pulled S.C.'s shirt down from the top and began to kiss her neck and upper chest. S.C. resisted, and Ajtun stopped. Ajtun later told S.C. not to tell anyone about what happened, warning her of financial harm to her family.

When S.C. was 13, she and her brother went to Ajtun's house to pick up food. Ajtun told S.C.'s brother to go outside and feed the dogs. Ajtun then locked him outside. S.C. locked herself in the bathroom, and when Ajtun tried to enter, she told him to go away. Ajtun unlocked the door and entered the bathroom, but he then left the room. When S.C. exited the bathroom, Ajtun grabbed her and pulled her into his bedroom. After closing the blinds, Ajtun pushed S.C. on the bed. Ajtun got on top of S.C., raised her shirt, pulled down her bra, and began to lick her breasts. Ajtun removed S.C.'s "bottoms" and underwear and began to lick her genitals. Ajtun inserted his fingers into S.C.'s vagina. S.C. told Ajtun to stop and reminded him her brother was outside.

On another occasion when S.C. was 13 and working at Ajtun's store, S.C. used the restroom. When she started to exit, Ajtun blocked the door and pushed her against the restroom wall. Ajtun raised S.C.'s shirt, pulled her bra down, and put his mouth on her breasts. S.C. told him to stop and tried to pull her shirt down to cover herself, but Ajtun continued. Later, Ajtun drove

S.C. home and warned her not to speak about what had happened.

On three or four other occasions when S.C. was 13, after Ajtun brought food or money to the family, he drove with S.C. alone to a "dark place." On these occasions Ajtun tried to kiss S.C. and licked and groped her breasts.

b. Counts 2 and 3 (lewd act upon a child)

Beginning after S.C. turned 14, Ajtun began to have vaginal intercourse with her. On one occasion, when S.C. and her brother visited Ajtun's house, Ajtun again sent S.C.'s brother outside to feed the dogs. While her brother was outside, Ajtun grabbed S.C. by both wrists and pulled her into his bedroom. There, Ajtun removed S.C.'s pants against her will and inserted his penis into her vagina. Ajtun held S.C. down by pinning her wrists to the mattress. S.C. cried.

On another occasion when S.C. was 14, Ajtun took her to his store and threw her on the floor in the back room. Ajtun got on top of S.C. and removed her clothes. Ajtun inserted his penis into S.C.'s vagina. S.C. cried and told him "no," but Ajtun did not stop until he ejaculated.

One day when S.C. was 14 or 15 years old, S.C. returned home from school while her mother was still at work. Ajtun came to S.C.'s front door and asked to use the restroom. S.C. let him in, then when S.C. tried to go to the basement, Ajtun grabbed her and took her into her mother's bedroom. Ajtun threw S.C. on her mother's bed and told her to undress. Ajtun climbed onto the bed and inserted his penis into S.C.'s vagina. Again, S.C. cried and told Ajtun "no." Afterward, S.C. went with Ajtun to pick up her younger sisters from daycare. During the drive, Ajtun

threatened to have S.C.'s mother deported if S.C. spoke to anyone about what had happened.

On another occasion when S.C. was 14 or 15 years old, Ajtun came to S.C.'s house to deliver groceries. This time Ajtun took S.C. into her bedroom, and he inserted his penis into her vagina while she lay on her bed.

c. Counts 6, 7, and 8 (forcible rape of a child)

After S.C. turned 15 years old on March 21, 2015, Ajtun continued to have sexual intercourse with her. On more than two occasions, Ajtun took S.C. out of class during the school day and drove her to his house. S.C. and Ajtun were alone in the house because Ajtun's wife and sons were not home. Ajtun took S.C. to his bedroom and inserted his penis into her vagina. Each time S.C. told Ajtun "no" and cried, but Ajtun told her to be quiet and did not stop. Afterward, Ajtun and S.C. picked up Ajtun's son from school.

On three occasions when S.C. was 15 years old, Ajtun drove her to "dark place[s]." S.C. sat in the back seat while Ajtun drove through an industrial area near S.C.'s home. Ajtun then parked, got in the back seat with S.C., pulled her pants down, and inserted his penis into her vagina. S.C. told Ajtun "no" and cried, but he did not stop. Ajtun activated the child lock on his car's rear doors, which prevented S.C. from opening the doors from the inside.

On another occasion during the same period, S.C. was at Ajtun's house visiting with Ajtun's son. Only S.C., Ajtun, and Ajtun's son were in the house. S.C. decided to take a shower and asked Ajtun's son if she could borrow a shirt and sweatpants. S.C. used the bathroom adjacent to Ajtun's bedroom. Before

showering, S.C. locked both bathroom doors, one leading to the hallway and the other to Ajtun's room. While S.C. was in the shower, Ajtun entered the bathroom without any clothing on. Ajtun told S.C. to be quiet, and he entered the shower with her. Ajtun then inserted his penis into S.C.'s anus. S.C. cried. Ajtun told her to be quiet and relax.

After S.C. started high school, while she was still 15, Ajtun began taking S.C. to a hotel for sex. On three occasions when Ajtun came to S.C.'s home to deliver food or money to her family, he picked up S.C. and took her to a hotel. There, Ajtun penetrated S.C.'s vagina with his penis. Each time, S.C. cried and said "no." Ajtun then took S.C. home without spending the night at the hotel. The trial court admitted into evidence records showing Ajtun rented a room at a hotel two miles from S.C.'s home on seven occasions, including on April 1 and October 8, 2015. The length of these stays ranged from less than a half-hour to over an hour.

On another occasion when she was 15 years old, Ajtun brought lingerie to the hotel for S.C. to wear. He instructed S.C. to change clothes in the bathroom of the hotel, which she did. Another time Ajtun requested S.C. wear lingerie at his house.

When S.C. was a freshman in high school in the fall of 2015 (when she was 15 years old), Ajtun took her to Bakersfield for his son's wrestling match. S.C. believed this incident occurred sometime after Christmas, in late 2015 or early 2016. Although Ajtun told S.C. and her mother that Ajtun's son and wife would be traveling with them, Ajtun and S.C. traveled alone to Bakersfield on a Saturday and returned the next day. On Saturday night Ajtun and S.C. stayed together in a hotel room. There, Ajtun told S.C. to shower, but she refused. Ajtun then

tried to remove S.C.'s clothes. S.C. told Ajtun to leave her alone, but he removed her clothes, pushed her against the bed, and inserted his penis into her vagina. S.C. told him "no" and cried.

On May 30, 2016 (when S.C. was 16), Ajtun came to S.C.'s house to pick up some things Betsy wanted to send to Guatemala. S.C. and her siblings were home, but S.C.'s mother was at work. Ajtun asked S.C.'s siblings if they wanted to go to the store. Ajtun went outside with S.C.'s three siblings and put them in his car. He left the children in the car and returned to the house. Ajtun told S.C. to undress. S.C. began to cry, told Ajtun "no," and asked Ajtun to leave her alone. Ajtun then undressed and lay on top of S.C., who tried to get up but could not. Ajtun inserted his penis into S.C.'s vagina. This was the last time Ajtun assaulted S.C.

Later that day or the next, S.C. told her boyfriend Nathan that Ajtun had abused her. Nathan counseled S.C. to tell her mother about Ajtun. The next day S.C. told her mother.

2. *Casandra—counts 4 and 5 (sexual battery and assault with intent to commit rape)*

Casandra testified Ajtun is her maternal aunt's cousin, whom her family called "uncle." Casandra, her younger sister J.G., her older sister, Cindy, and her mother occasionally visited Ajtun's house for family gatherings. Casandra's mother testified that when she was short on money, Ajtun sometimes loaned her money to pay the rent and buy clothes.

When Casandra was around 15 years old, her mother was experiencing financial difficulties. Ajtun offered to take Casandra and her sisters out to buy lingerie. Ajtun took the

three sisters to the store and bought them each three sets of undergarments.[4]

Casandra and her two sisters spent the night at Ajtun's house three or four times, to spend time with Ajtun's sons whom they considered cousins. On one of the occasions, the three sisters stayed over at Ajtun's house while their mother was away on a trip. At the time Casandra was a sophomore in high school and was 15 or 16 years old. That evening Ajtun offered Casandra and Cindy wine, and they drank together in his bedroom. Casandra had never drunk wine before, and she became intoxicated. After awhile, Cindy left the room, leaving Ajtun and Casandra alone together.[5]

At one point Casandra was sitting on the bed talking on the phone to her boyfriend. Ajtun then silently climbed on top of Casandra, pulled up her shirt, pulled down her bra, and began to kiss her neck and put his hands and mouth on her breasts. After about two minutes, Ajtun stood and began to unbutton his pants. Casandra told Ajtun, "I can't do this." Ajtun asked, "Why?" Casandra replied, "I'm on my period," and she ran out of the room and locked herself in a small bathroom for "half the night" because she was "sacred, shocked, and confused."

The next morning Casandra's mother picked her and her sisters up from Ajtun's house. A few months later on January 8, 2012, Casandra sent a series of online message to her friend about the incident in Ajtun's bedroom. Casandra wrote, "the

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[4] J.G. corroborated Casandra's testimony Ajtun took the three sisters to buy lingerie.

[5] Cindy corroborated Casandra's testimony Ajtun gave Cindy and Casandra wine before Cindy left Casandra and Ajtun alone in his bedroom.

perverted fuck tried to rape me, but, of course, I got away." Casandra began to avoid Ajtun and stopped attending family events where he would be present, including her own mother's wedding.

3. *Evidence of uncharged crimes*

a. J.G.

J.G. is the sister of Casandra and Cindy. J.G. testified that when she was 11 years old (in approximately 2008), she, her two sisters, and her mother went with Ajtun, his wife, and his sons to an amusement park. At the park, Ajtun rode in the seat behind J.G. on one of the rides. During a drop in the ride, Ajtun reached forward and squeezed J.G.'s breasts with both hands. J.G. believed it must have been an accident due to the ride. Then on a second drop in the ride, Ajtun reached forward and again grabbed J.G.'s breasts, harder this time. J.G. then realized Ajtun had groped her on purpose. J.G. said nothing to Ajtun. Later that day J.G. told her mother what had happened. J.G. was crying and upset. Her mother told her Ajtun "wouldn't do that" and "[i]t was probably a misunderstanding." After the incident, J.G. tried to avoid Ajtun.

In 2015 J.G. told her therapist about Ajtun's conduct at the amusement park. After the therapist reported the conduct, the police interviewed J.G. J.G. told the police she would not participate in the case against Ajtun. That day J.G. overheard Casandra talking to the police, learning for the first time Ajtun had abused Casandra. J.G. did not learn about Ajtun's abuse of her older sister Cindy until the prosecutor spoke with Casandra in connection with this case. Once J.G. found out about what

Ajtun did to both her sisters, she decided to participate in the case.

b. Cindy

Cindy testified that in October 2010 Ajtun picked her up from school and took her out to celebrate her 16th birthday. Ajtun took Cindy out for breakfast, then he took her to a lingerie store and told her to "pick out whatever [she] want[ed]." Ajtun bought her five sets of undergarments.

When they left the mall, Cindy believed Ajtun was taking her home. But Ajtun said he "needed to stop real quick," and he parked on the street near a hotel. Ajtun told Cindy, "Wait, I'll be back," and he left Cindy alone in the car. When Ajtun returned 10 minutes later, he drove the car into the hotel parking lot. Ajtun "said he was tired and he needed to rest before he took [Cindy] home." Cindy told Ajtun she wanted to go home and would wait in the car. Ajtun insisted Cindy come up to the room. Ajtun asked Cindy to bring her new undergarments.

In the room Ajtun lay down on the bed while Cindy went into the bathroom to try on her new undergarments. After trying them on, Cindy got dressed and left the bathroom. Cindy told Ajtun the garments fit and said, "[L]et's go home." Ajtun told her he wanted to see how the "gifts" looked on her. Cindy told him "no," but Ajtun forcefully insisted she let him see how the garments fit. Cindy went back into the bathroom and changed. She returned from the bathroom wearing only a bra and underwear. Ajtun grabbed the bra with one hand and rubbed Cindy's breast with the other, while telling her the bra was too large. Ajtun asked Cindy to turn around, then commented she was too young to have "stretch marks on [her] ass." Cindy

changed in the bathroom, and five minutes later Ajtun took Cindy home. Cindy did not tell her mother what had happened.

Another time when Cindy was 16, she stayed overnight at Ajtun's house to celebrate the birthday of one of Ajtun's sons. Cindy's mother and sisters stayed as well. Cindy slept on the floor in a room with Ajtun's two sons and her two sisters. In the middle of the night, Cindy woke up because Ajtun was removing her underwear. Cindy froze. Without speaking, Ajtun lay on top of Cindy and penetrated her vagina with his penis. After five minutes, Ajtun got up and walked away. Cindy cried, put her clothes back on, and went back to bed.

The next day Cindy privately confronted Ajtun about what he had done. Cindy did not tell anyone what Ajtun had done because she was concerned for Ajtun's sons and afraid of what would happen to her family if it lost Ajtun's financial support. After that Cindy tried to avoid Ajtun.

In September 2016 Cindy learned for the first time of the allegations her sisters made against Ajtun. Cindy did not report Ajtun's rape of her her to law enforcement until 2018.[6]

C. *The Verdict*

After the close of evidence, the prosecutor amended the information to allege as to count 7 the offense occurred on or between March 31 and May 30, 2016, and as to count 8, the offense occurred on May 30, 2016. The jury acquitted Ajtun on count 5 for assault with the intent to commit rape. The jury found Ajtun guilty of the remaining counts.

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[6] Ajtun did not testify or call any witnesses.

D. *Sentencing*

The trial court sentenced Ajtun to an aggregate term of 45 years four months. The trial court selected count 4 as the base term and imposed the upper term of four years. On count 1 for continuous sexual abuse, the court imposed a full, separate, and consecutive upper term of 16 years.[7] The court imposed consecutive terms of eight months (one-third the middle term of two years) on counts 2 and 3. On counts 6, 7, and 8, the court imposed full, separate, and consecutive upper terms of eight years on each count. The court also imposed a restitution fine of $10,000 (§ 1202.4, subd. (b)) and imposed and suspended a parole revocation restitution fine in the same amount (§ 1202.45). The trial court did not state its reasons for imposing the restitution and parole revocation restitution fines or why it imposed an amount above the $300 statutory minimum. (§§ 1202.4, subd. (b)(1), 1202.45.) At sentencing, Ajtun did not object to imposition of the assessments and fines or raise his inability to pay.

Ajtun timely appealed.

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[7] Section 667.6, subdivision (d), provides for imposition of full, separate, and consecutive terms for each violation of specified offenses if the crimes involve separate victims or the same victim on separate occasions. The specified offenses include the continuous sexual abuse of a child under section 288.5 (§ 667.6, subd. (e)(6)) and rape in violation of section 261, subdivision (a)(2) (§ 667.6, subd. (e)(1)).

DISCUSSION

A. *The Trial Court Did Not Abuse Its Discretion in Admitting Evidence of Ajtun's Uncharged Sex Crimes*

1. *Proceedings below*

Prior to the start of trial, Ajtun's attorney sought to exclude evidence of Ajtun's uncharged sex crimes against J.G. and Cindy. She objected that the events were too remote in time and were unrelated to the charged offenses. The trial court ruled the incident with J.G. at the amusement park and the incident with Cindy at the hotel and at Ajtun's house were admissible as propensity evidence under Evidence Code section 1108. The court reasoned that while "the similarities aren't great" between the charged and the uncharged offenses, undue prejudice was "almost nonexistent" as "[t]he only prejudicial value would come from the fact that [there] is some probative merit to [Ajtun's] intent." The court added, "As far as the rape is concerned, I think that that would be admissible to prove the [assault with intent to commit a rape]. Unless there's something about that rape . . . that would inflame the jury over and above what they'd be hearing about in general . . . ."

2. *Applicable law and standard of review*

"The general public policy on character or propensity evidence is that it is *not* admissible to prove conduct on a given occasion. [Citations.] [Evidence Code] [s]ection 1108 creates a narrow exception to this rule based on the recognition that ' "[t]he propensity to commit sexual offenses is not a common attribute among the general public."' [Citations.] ""In child molestation actions a history of similar acts tends to be exceptionally

probative because it shows an unusual disposition of the defendant—a sexual or sado-sexual interest in children—that simply does not exist in ordinary people.'"'" (*People v. Cottone* (2013) 57 Cal.4th 269, 285 (*Cottone*); accord, *People v. Villatoro* (2012) 54 Cal.4th 1152, 1164 (*Villatoro*) ["the clear purpose of [Evidence Code] section 1108 is to permit the jury's consideration of evidence of a defendant's propensity to commit sexual offenses"].) "'[C]ase law clearly shows that evidence that [a defendant] committed other sex offenses is at least circumstantially *relevant* to the issue of his disposition or propensity to commit these offenses.'" (*Villatoro*, at p. 1164; *Cottone*, at p. 286.)

Admission of evidence pursuant to Evidence Code section 1108 is subject to an analysis of prejudice under Evidence Code section 352. (*People v. Merriman* (2014) 60 Cal.4th 1, 57 (*Merriman*) ["Evidence Code section 1108 permits the prosecutor in a sexual offense trial to present evidence of the defendant's other sexual offenses, so long as the other sexual offenses are not inadmissible pursuant to Evidence Code section 352."]; *People v. Avila* (2014) 59 Cal.4th 496, 515 (*Avila*) [Evid. Code, § 1108 "'preserves the trial court's discretion to exclude evidence under [Evidence Code] section 352 if its prejudicial effect substantially outweighs its probative value'"].)

Evidence is admissible under Evidence Code section 352 if its probative value is not "'substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.'" (*People v. Nguyen* (2010) 184 Cal.App.4th 1096, 1116.) In determining the admissibility of uncharged crimes evidence

under Evidence Code sections 1108 and 352, a trial court must consider "(1) whether the propensity evidence has probative value, e.g., whether the uncharged conduct is similar enough to the charged behavior to tend to show the defendant did in fact commit the charged offense; (2) whether the propensity evidence is stronger and more inflammatory than evidence of the defendant's charged acts; (3) whether the uncharged conduct is remote or stale; (4) whether the propensity evidence is likely to confuse or distract the jurors from their main inquiry, e.g., whether the jury might be tempted to punish the defendant for his uncharged, unpunished conduct; and (5) whether admission of the propensity evidence will require an undue consumption of time." (*Nguyen*, at p. 1117; accord, *People v. Falsetta* (1999) 21 Cal.4th 903, 915, 917.) "'Even where a defendant is charged with multiple sex offenses, they may be dissimilar enough, or so remote or unconnected to each other, that the trial court could apply the criteria of [Evidence Code] section 352 and determine that it is not proper for the jury to consider one or more of the charged offenses as evidence that the defendant likely committed any of the other charged offenses.'" (*Villatoro, supra*, 54 Cal.4th at p. 1163.)

"'Like any ruling under [Evidence Code] section 352, the trial court's ruling admitting evidence under [Evidence Code] section 1108 is subject to review for abuse of discretion.'" (*Avila, supra*, 59 Cal.4th at p. 515; accord, *Merriman, supra*, 60 Cal.4th at p. 58 ["A court has broad discretion to exclude, as substantially more prejudicial than probative, sexual offense evidence that meets the requirements for admission under Evidence Code section 1108, and its ruling in this regard is reviewed for abuse of discretion."].)

3. *The trial court did not abuse its discretion in admitting evidence of the uncharged sex crimes*

Ajtun concedes the charged and uncharged sex offenses constituted "sexual offenses" within the meaning of Evidence Code section 1108.[8] The evidence was probative of Ajtun's intent in committing the charged crimes because it tended to show Ajtun's sexual propensity to commit sex offenses against young girls and to prey on young girls in his extended family, taking advantage of his position of trust and authority to commit the crimes. Further, the uncharged crimes evidence was similar to the conduct underlying the charged offenses. (See *People v. Nguyen, supra*, 184 Cal.App.4th at p. 1117 [trial court did not abuse its discretion in finding "the charged offenses and the uncharged conduct were similar because defendant developed a relationship with each victim through 'community involvement, church, or whatever, and then gain[ed] the confidence of [the victim and used] that to accomplish a rape.'"].) Ajtun took advantage of a family trip to the amusement park to molest both J.G. and S.C. Ajtun requested both Cindy and S.C. wear lingerie in a hotel room where he touched intimate parts of their bodies.

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[8] In his reply brief, Ajtun argues for the first time that "having Cindy model lingerie" does not constitute a "sexual offense" within the meaning of Evidence Code section 1108. Ajtun forfeited this argument by failing to raise it (and expressly conceding it) in his opening brief. (*Aptos Council v. County of Santa Cruz* (2017) 10 Cal.App.5th 266, 296, fn. 7 ["Issues not raised in the appellant's opening brief are deemed waived or abandoned."]; *Altavion, Inc. v. Konica Minolta Systems Laboratory, Inc.* (2014) 226 Cal.App.4th 26, 63 [argument made for the first time in reply brief is forfeited].)

Ajtun raped both Cindy and S.C. in his own home while members of their families were present.

J.G.'s and Cindy's testimony did not consume an inordinate amount of trial time. Nor were the facts of Ajtun's uncharged crimes more inflammatory than the evidence of the charged crimes, as to which S.C. testified about Ajtun's serial abuse and rape over the course of several years. (*Merriman, supra*, 60 Cal.4th at p. 42 ["The sexual assaults evidence was considerably less inflammatory than the murder and, therefore, its admission would not likely have had an unduly prejudicial impact on a jury."]; *People v. Lewis* (2009) 46 Cal.4th 1255, 1287-1288 [evidence of prior rape was less inflammatory than the charge that the defendant raped, strangled, and cut the throat of the murder victim while her children were asleep upstairs].)

Ajtun argues evidence of crimes committed against three sisters was "inherently prejudicial" and "posed a danger of the jury convicting defendant of the charged [offenses] . . . in order to punish defendant for committing sex crimes against all three sisters." But courts routinely allow testimony of uncharged crimes against family members. (See *People v. Hernandez* (2011) 200 Cal.App.4th 953, 968 [trial court did not abuse its discretion in admitting evidence of defendant's uncharged crimes against his daughter to prove charged crimes against his granddaughter]; *Cottone, supra*, 57 Cal.4th at p. 286 ["The conduct in this case, which involved touching the vaginal area of his young sister, was manifestly relevant on the question of whether defendant sexually assaulted another young female relative."].) Further, the jury found Ajtun guilty of sexual battery of Casandra based on the incident where she was intoxicated with wine in his bedroom, but it acquitted Ajtun as to assault with the intent to

commit rape based on the same incident, suggesting the jury was not unduly prejudiced against Ajtun based on his sexual abuse of Casandra's sisters.

Ajtun also contends the testimony of J.G. and Casandra was unduly prejudicial because it related to events too remote in time. But "the passage of time generally goes to the weight of the evidence, not its admissibility." (*People v. Hernandez, supra*, 200 Cal.App.4th at p. 968 [trial court did not abuse its discretion in admitting uncharged crimes evidence despite passage of time "'as long as 40 years from the beginning of the first alleged offense against the daughter to the completion of the last alleged offense against the granddaughter'"]; *People v. Branch* (2001) 91 Cal.App.4th 274, 285 [30-year-old uncharged offense not too remote where prior and current offenses were "remarkably similar"].) Ajtun groped J.G.'s breasts on the amusement park ride in 2008 or 2009, a few years before he first molested S.C. by groping her thigh in his car on the drive home from an amusement park in 2011. In the fall of 2010, Ajtun took Cindy to buy lingerie then groped her in a hotel room, and he later raped Cindy in his house while she was there for a sleepover for his son's birthday. Ajtun sexually assaulted Casandra in his home sometime in 2011. Further, Ajtun does not assert the passage of time prevented him from calling any witnesses.

Finally, Ajtun argues "there was no certainty of [Ajtun's] commission [of the uncharged crimes] in light of the delayed reporting and circumstances surrounding the reports," including that J.G. refused to participate in the prosecution of Ajtun until she learned of Ajtun's abuse of her sisters. "It is well settled, however, that the reliability of a witness's testimony is a matter for the jury to decide and therefore concerns the weight of the

evidence, and not its admissibility." (*Merriman, supra*, 60 Cal.4th at p. 57 [rejecting defendant's argument victim's "heavy drug use" and "failure to report the incident to authorities until long after it had occurred" render evidence of uncharged sex crime inadmissible].)[9]

B. *The Trial Court Did Not Commit Instructional Error on the Burden of Proof Applicable to Ajtun's Uncharged Sex Crimes*

Ajtun contends the trial court's instruction of the jury with CALCRIM No. 1191A on uncharged crimes evidence in conjunction with CALCRIM No. 220 on proof beyond a reasonable doubt confused the jury as to the applicable burden of proof, allowing the jury to convict Ajtun of the charged offenses based on a preponderance of the evidence. He also asserts uncharged crimes evidence must be proved beyond a reasonable doubt, not by a preponderance of the evidence, before the jury may consider it. Neither contention has merit.

As to his first argument, Ajtun points to the language in CALCRIM No. 220, as instructed, that "[w]henever I tell you the People must prove something, I mean they must prove it beyond a reasonable doubt unless I specifically tell you otherwise." According to Ajtun, because the court instructed the jury it

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[9] Ajtun also argues admission of the uncharged crimes prejudiced his defense because the need to defend against the additional testimony weighed against his ability to exercise his right to testify at trial in his defense. But this case is no different from any case involving evidence of uncharged crimes in that the defendant would need to address both the charged and uncharged crimes.

should apply a standard of proof of beyond a reasonable doubt unless the court tells it "otherwise," the jury could have assumed under CALCRIM No. 1191A it should apply the preponderance of the evidence standard to both the uncharged and charged crimes. This strained reading of the jury instructions is not reasonable because CALCRIM No. 1191A makes clear the jury must find the charged offenses have been proven beyond a reasonable doubt. As the trial court instructed, "If you conclude that the defendant committed the uncharged offenses, that conclusion is only one factor to consider along with all the other evidence. It is not sufficient by itself to prove the defendant is guilty of any of the related crimes. The People must still prove the charges beyond a reasonable doubt."

As the Supreme Court in *People v. Reliford* (2003) 29 Cal.4th 1007, 1013, 1016, held, in rejecting a similar challenge to the analogous instruction on uncharged crimes evidence, CALJIC No. 2.50.01, "We do not find it reasonably likely a jury could interpret the instructions to authorize conviction of the charged offenses based on a lowered standard of proof. Nothing in the instructions authorized the jury to use the preponderance-of-the-evidence standard for anything other than the preliminary determination whether defendant committed a prior sexual offense . . . . The instructions instead explained that, in all other respects, the People had the burden of proving defendant guilty 'beyond a reasonable doubt.' [Citations.] Any other reading would have rendered the reference to reasonable doubt a nullity." As in *Reliford*, we presume the jurors "grasp[ed] their duty" and correctly "appl[ied] the preponderance-of-the-evidence standard to the preliminary fact identified in the instruction and to apply

the reasonable-doubt standard for all other determinations." (*Reliford*, at p. 1016.)[10]

As to Ajtun's contention uncharged crimes must be proved beyond a reasonable doubt before the jury may consider the uncharged crimes, the Supreme Court has held otherwise. (*Avila, supra*, 59 Cal.4th at p. 516 ["'[T]he defendant must be found guilty beyond a reasonable doubt of a crime to be convicted of it, but other crimes evidence need be proven only by a preponderance of the evidence.'"]; *Cottone, supra*, 57 Cal.4th at pp. 286-287 ["The general rule is that preliminary fact determinations affecting the admissibility of evidence . . . are subject to proof by a preponderance of the evidence unless otherwise provided by law. [Citations.] The same standard generally applies to proof of unadjudicated conduct admitted under [Evidence Code] section 1108."].)

C. *Substantial Evidence Supports Ajtun's Conviction of Continuous Sexual Abuse (Count 1)*

1. *Standard of review and governing law*

"In evaluating a claim regarding the sufficiency of the evidence, we review the record 'in the light most favorable to the

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[10] Ajtun is correct the court in *People v. Reliford, supra*, 29 Cal.4th at page 1013 did not confront the precise argument asserted by Ajtun that the trial court's instruction with CALCRIM No. 220—that the standard of proof beyond a reasonable doubt applies unless the court instructs the jury "otherwise"—because CALJIC No. 2.90 did not contain similar language. However, the reasoning in *Reliford* approving the uncharged crimes instruction as properly stating the burdens of proof for charged and uncharged crimes evidence is directly on point.

judgment below to determine whether it discloses substantial evidence—that is, evidence which is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.'" (*People v. Westerfield* (2019) 6 Cal.5th 632, 713; accord, *People v. Penunuri* (2018) 5 Cal.5th 126, 142 ["'To assess the evidence's sufficiency, we review the whole record to determine whether *any* rational trier of fact could have found the essential elements of the crime or special circumstances beyond a reasonable doubt.'"]; *People v. Nguyen* (2015) 61 Cal.4th 1015, 1055-1056 ["'[I]t is the jury, not the appellate court[,] which must be convinced of the defendant's guilt . . . .'"].) "'We resolve neither credibility issues nor evidentiary conflicts; we look for substantial evidence.'" (*People v. Letner and Tobin* (2010) 50 Cal.4th 99, 162.)

Section 288.5, subdivision (a), provides in pertinent part that "[a]ny person who either resides in the same home with the minor child or has recurring access to the child, who over a period of time, not less than three months in duration, engages in three or more acts of substantial sexual conduct with a child under the age of 14 years at the time of the commission of the offense, as defined in subdivision (b) of Section 1203.066, or three or more acts of lewd or lascivious conduct, as defined in Section 288, with a child under the age of 14 years at the time of the commission of the offense is guilty of the offense of continuous sexual abuse of a child . . . ."[11]

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[11] Section 1203.066, subdivision (b), provides, "'Substantial sexual conduct' means penetration of the vagina or rectum of either the victim or the offender by the penis of the other or by any foreign object, oral copulation, or masturbation of either the victim or the offender."

"'[T]he prosecution need not prove the exact dates of the predicate sexual offenses in order to satisfy the three-month element. Rather, it must adduce sufficient evidence to support a reasonable inference that at least three months elapsed between the first and last sexual acts. Generic testimony is certainly capable of satisfying that requirement . . . [but] "the victim must be able to describe *the general time period* in which these acts occurred (e.g., 'the summer before my fourth grade,' or 'during each Sunday morning after he came to live with us'), to assure the acts were committed within the applicable limitation period." [Citations.] That is, while generic testimony may suffice, it cannot be so vague that the trier of fact can only speculate as to whether the statutory elements have been satisfied.'" (*People v. Valenti* (2016) 243 Cal.App.4th 1140, 1158.)

The statutory term "recurring access" has "no meaning, technical or otherwise, . . . other than its commonly understood meaning as an ongoing ability to approach and contact someone time after time." (*People v. Rodriguez* (2002) 28 Cal.4th 543, 547; see *ibid.*, quoting Merriam-Webster's Collegiate Dict. (10th ed. 1993) pp. 6 ["the term 'access' means 'permission, liberty, or ability to enter, approach, communicate with, or pass to and from,' or 'freedom or ability to obtain or make use of'"] & 978 ["the term 'recur' means 'to occur again after an interval: occur time after time'"].)

"'"As in any case involving statutory interpretation, our fundamental task here is to determine the Legislature's intent so as to effectuate the law's purpose. [Citation.] We begin by examining the statute's words, giving them a plain and commonsense meaning. [Citation.]" [Citation.] "'When the language of a statute is clear, we need go no further.' [Citation.]

But where a statute's terms are unclear or ambiguous, we may 'look to a variety of extrinsic aids, including the ostensible objects to be achieved, the evils to be remedied, the legislative history, public policy, contemporaneous administrative construction, and the statutory scheme of which the statute is a part.'"'" (*People v. Scott* (2014) 58 Cal.4th 1415, 1421; accord, *People v. White* (2017) 2 Cal.5th 349, 354.)

2. *Substantial evidence supports the jury's finding Ajtun committed qualifying acts of sexual abuse against S.C. over a period of time longer than three months*

The information alleged Ajtun unlawfully engaged in three of more qualifying acts of substantial sexual conduct with S.C. during the period when S.C. was between the ages of 11 and 14. On appeal, Ajtun contends substantial evidence does not support this conviction because S.C. was in foster care for a seven-month period when she was 12 years old during which Ajtun did not have access to her. Only after S.C. returned to live with her mother did she start working at Ajtun's store, at which time the abuse resumed. Ajtun argues that because his access to S.C. was interrupted after he groped S.C.'s thigh in his car when she was 11 years old, this act cannot form the basis for his conviction of continuous sexual abuse, and absent that incident, there is no evidence he committed three qualifying acts with S.C. over a period of time longer than three months. Ajtun asserts S.C. did not testify as to the dates on which she was abused when she was 12 and 13 years old, and therefore those instances of abuse could have occurred over shorter than a three-month period.

Ajtun's argument fails because section 288.5 requires sexual abuse over a period longer than three months by a person

with recurring access to the child, not three months of continuous access to the child. (*People v. Vasquez* (1996) 51 Cal.App.4th 1277, 1284 (*Vasquez*).) In *Vasquez*, the child victim split her time between her father's home and the home shared by her mother and the defendant. (*Id.* at p. 1281.) After the defendant molested the child in July 1989, the child was removed from his home the next month, "placed in a facility called Orangewood for one or two weeks," and then returned to live with her father. (*Ibid.*) The child did not return to the defendant's home until "the early summer of 1991," when the sexual abuse resumed. (*Ibid.*) The Court of Appeal rejected the defendant's argument that "section 288.5 is violated only if a defendant resided with, or had recurring access to, the victim for a single *continuous* period of three months or more." (*Id.* at p. 1283-1284.)

As the *Vasquez* court reasoned, "The requirement of a three-month period of time is grammatically attached to the requirement of three or more acts, not to the requirement of a shared residence or recurring access. The statutory language thus does not require that the defendant reside with, or have access to, the minor continuously for three consecutive months for a violation to be found, but would appear to be satisfied if, for example, a child regularly spent Christmas, spring, and part of the child's summer vacations with the defendant, and the defendant sexually molested the child during the visits, as long as at least three acts of molestation could be proven." (*Vasquez, supra*, 51 Cal.App.4th at pp. 1284-1285.)

Further, as the *Vasquez* court observed, in enacting section 288.5, the Legislature sought to address the sexual abuse of "'resident child molesters,' since such offenders repeatedly victimize small children in similar ways and under similar

circumstances, so that the victims cannot relate the molestations to specific times or circumstances." (*Vasquez, supra*, 51 Cal.4th at p. 1285, quoting Senate Floor Analysis, 3d Reading of Assem. Bill No. 2212 (1989-1990 Reg. Sess.), pp. 2-3.) As the *Vasquez* court explained, a reading of the statute to require three months of continued access would not advance the Legislature's policy objectives, but rather, would create a loophole for the "sexual predator who abuses a child every Christmas vacation for three years" even though that defendant "is certainly no less culpable than one who abuses the child three times in three successive months." (*Vasquez*, at p. 1285.)

We agree with the *Vasquez* court that section 288.5 "is violated if the defendant (1) resided with, or had recurring access to, a child under fourteen, and (2) committed three or more acts of sexual molestation of the child, and (3) three or more months passed between the first and the last act of molestation, regardless of whether the defendant resided with or had access to the child *continuously* throughout the three-or-more-month period." (*Vasquez, supra*, 51 Cal.App.4th at p. 1287; accord, *People v. Mejia* (2007) 155 Cal.App.4th 86, 94.) Thus, substantial evidence supports the jury's determination Ajtun committed at least three qualifying acts during the period when S.C. was between the ages of 11 and 14.

D. *Substantial Evidence Supports Ajtun's Conviction of Forcible Rape of a Child over 14 Years Old (Count 7)*

Ajtun argues substantial evidence does not support his conviction of forcible rape as alleged in count 7 because there was no evidence he raped S.C. between "March 31, 2016 and May 30, 2016," as alleged in the amended information. This contention

lacks merit. The People were not required to prove the rape occurred on or between the specific dates alleged, as long as they proved the offense occurred within the statutory period. (*People v. Garcia* (2016) 247 Cal.App.4th 1013, 1022 (*Garcia*) ["'The law is clear that, when it is charged that an offense was committed "on or about" a named date, the exact date need not be proved unless the time "is a material ingredient in the offense" [citation], and the evidence is not insufficient merely because it shows that the offense was committed on another date.'"].)

In *People v. Jones* (1990) 51 Cal.3d 294 (*Jones*), the Supreme Court upheld the defendant's convictions of six counts of lewd conduct, each alleged to have occurred in a different two-month period. (*Id.* at pp. 301, 303, 315-316.) The court held "the victim's failure to specify precise date, time, place or circumstance" did not "render generic testimony insufficient." (*Id.* at p. 315.) The court reasoned, "[T]he victim specified the type of conduct involved (rape) and its frequency ('almost every night' for three months), and confirmed that such conduct occurred during the limitation period. Nothing more is required to establish the substantiality of the victim's testimony in child molestation cases." (*Id.* at p. 316.) Similarly, in *Garcia, supra*, 247 Cal.App.4th 1013, the defendant argued on appeal substantial evidence did not support his convictions of eight counts of forcible lewd acts on a child where the information alleged four counts were committed in one year, and four the next, but the victim did not testify as to the years in which the offenses were committed. (*Id.* at pp. 1015, 1022-1023.) The Court of Appeal rejected this argument, explaining, "The jury was not obligated to match the counts to one-year periods. Indeed, it was instructed that '[t]he People are not required to

prove that the crime took place exactly on that day but only that it happened reasonably close to that day.'" (*Id.* at p. 1023.)

Here, S.C. testified to at least 10 instances in which Ajtun raped her during the time period alleged in the amended information, from March 11 to May 30, 2016. As in *Jones* and *Garcia*, the prosecution was not obligated to prove exactly when each rape took place, "'but only that it happened reasonably close'" to the time period alleged. (*Garcia, supra*, 247 Cal.App.4th at p. 1023.)[12]

E. *Ajtun Impliedly Consented to Amendment of the Information To Allege He Committed Sexual Battery in Violation of Section 243.4, Subdivision (a)*

Ajtun contends as to count 4 for sexual battery against Casandra in violation of section 243.4, subdivision (d), that insufficient evidence supports his conviction because the only evidence presented was that Ajtun touched Casandra (a violation

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[12] Because we conclude substantial evidence supports Ajtun's conviction of rape as alleged in count 7, we do not reach whether S.C.'s testimony about Ajtun's rape of her in Bakersfield in late 2015 or early 2016 supports Ajtun's conviction on count 7. For the same reason, we deny as unnecessary Ajtun's July 10, 2019 request for judicial notice of documents related to the Bakersfield incident. (See *Jordache Enterprises, Inc. v. Brobeck, Phleger & Harrison* (1998) 18 Cal.4th 739, 748, fn. 6 [judicial notice denied where "the requests present no issue for which judicial notice of these items is necessary, helpful, or relevant"]; *Appel v. Superior Court* (2013) 214 Cal.App.4th 329, 342, fn. 6 [judicial notice denied where materials are not "relevant or necessary" to the court's analysis].)

of section 243.4, subdivision (a)), not that Ajtun caused Casandra to touch an intimate part of Ajtun's body or her own body (a violation of section 243.4, subdivision (d)).[13] The People respond the information and verdict form contained a typographical error, and by not objecting to the jury instructions and verdict form, Ajtun impliedly consented to an informal amendment of the information to allege a violation of section 243.4, subdivision (a). The People have the better argument.

1. *Proceedings below*

As discussed, the amended information charged Ajtun in count 4 with sexual battery in violation of section 243.4, subdivision (d). As relevant here, the trial court instructed the jury on count 4 with CALCRIM No. 935, "The defendant is charged with sexual battery in violation of Penal Code Section 243.4. [¶] To prove the defendant is guilty of this crime, the People must prove that, one, the defendant unlawfully constrained Casandra G.; [¶] two, while Casandra G. was

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[13] Section 243.4, subdivision (a), provides a person is guilty of sexual battery if he or she "touches an intimate part of another person while that person is unlawfully restrained by the accused or an accomplice, and if the touching is against the will of the person touched and is for the purpose of sexual arousal, sexual gratification, or sexual abuse, is guilty of sexual battery." Subdivision (d) of the same section provides a person commits sexual battery if he or she "for the purpose of sexual arousal, sexual gratification, or sexual abuse, causes another, against that person's will while that person is unlawfully restrained either by the accused or an accomplice, . . . to masturbate or touch an intimate part of either of those persons or a third person, is guilty of sexual battery."

restrained, the defendant touched an intimate part of Casandra G.; [¶] three, the touching was done against Casandra G.'s will; [¶] four, the touching was done for the specific purpose of sexual arousal, sexual gratification, or sexual abuse." The verdict forms on count 4 included only the charged offense of sexual battery "in violation of Penal Code Section 243.4(d), a felony, as alleged in count 4 of the Information."

During her closing argument, the prosecutor described the conduct underlying count 4 as Ajtun having "touched an intimate part of her body against her will." Defense counsel argued, "Casandra and Cindy's stor[ies] about the wine don't match up. They don't make sense." Defense counsel asserted it was more likely that Ajtun had caught Casandra and Cindy drinking wine and forbade them from coming to his house again.

The jury found Ajtun "guilty of the crime of sexual battery, upon Casandra G. . . . in violation of Penal Code Section 243.4(d), a felony, as alleged in count 4 of the information." (Capitalization and boldface omitted.)

2. *Due process notice requirements*

"A conviction for a nonincluded offense implicates a defendant's due process right to notice. 'No principle of procedural due process is more clearly established than that notice of the specific charge, and a chance to be heard in a trial of the issues raised by that charge, if desired, are among the constitutional rights of every accused in a criminal proceeding in all courts, state or federal.' [Citations.] 'A criminal defendant must be given fair notice of the charges against him in order that he may have a reasonable opportunity properly to prepare a defense and avoid unfair surprise at trial.'" (*People v. Toro* (1989)

47 Cal.3d 966, 973 (*Toro*), disapproved on another ground in *People v. Guiuan* (1998) 18 Cal.4th 558, 568, fn. 3; accord, P*eople v. Ortega* (2015) 240 Cal.App.4th 956, 968-969.)

However, "where an information is amended at trial to charge an additional offense, and the defendant neither objects nor moves for a continuance, an objection based on lack of notice may not be raised on appeal. [Citations.] There is no difference in principle between adding a new offense at trial by amending the information and adding the same charge by verdict forms and jury instructions." (*Toro, supra*, 47 Cal.3d at p. 976, fn. omitted [by not objecting to instructions and verdict form on lesser related offense, defendant impliedly consented to jury's consideration of offense]; accord, *People v. Goolsby* (2015) 62 Cal.4th 360, 366-367 [defendant impliedly consented to jury's consideration of lesser related offense of arson of property not charged in information by not asserting express objection to instruction]; *People v. Torres* (2011) 198 Cal.App.4th 1131, 1140 ["an objection to lack of notice of the charges must be raised in the trial court and cannot be raised for the first time on appeal"].)

3. *Ajtun had notice of the charged offense under section 243.4, subdivision (a), and impliedly consented to amendment of the information*

Ajtun cannot credibly claim he lacked notice the People sought to prove he sexually battered Casandra by touching an intimate part of her body. Although count 4 of the information alleged facts constituting a violation of section 243.4, subdivision (d), the facts adduced at the preliminary hearing in support of count 4 related solely to Casandra's testimony Ajtun gave her wine in his bedroom, and then lay on top of her and licked her

breasts. Further, Ajtun's attorney did not object to the trial court instructing the jury with CALCRIM No. 935 on the elements of section 243.4, subdivision (a). She likewise did not object when the trial court provided verdict forms for count 4 that referred to a violation of section 243.4, subdivision (d), initialing the back of each page of the verdict forms to show her approval. In her closing, defense counsel asserted Cindy and Casandra were unreliable witnesses with regard to the wine incident, but she did not argue the elements of section 243.4, subdivision (d), were not met because of the type of touching Casandra testified occurred.

This case is similar to *Toro, supra*, 47 Cal.3d at pages 976 to 977, in which the Supreme Court upheld the defendant's conviction of battery with serious bodily injury, which was not charged in the information, because the jury was instructed on and received verdict forms for the offense, thereby informally amending the information. We recognize a distinguishing factor from *Toro* is that the verdict forms in that case correctly reflected the uncharged offense, but here the jury was mistakenly given a verdict form for a violation of section 243.4, subdivision (d). (*Toro*, at p. 976.) However, after not objecting to the instruction on section 243.4, subdivision (a), Ajtun also failed to object to the verdict form listing the offense as a violation of section 243.4, subdivision (d). "An objection to jury verdict forms is generally deemed waived if not raised in the trial court." (*Toro*, at p. 976, fn. 6.) Further, Ajtun cannot claim prejudice from the verdict form because the jury was only instructed on the elements of a violation of section 243.4, subdivision (a), so its verdict finding Ajtun guilty of sexual battery reflected its finding that section had been violated.

In addition, as in *Toro*, Ajtun may have benefitted from the jury's instruction on the correct elements of a violation of section 243.4, subdivision (a), because the jury convicted Ajtun of sexual battery against Casandra, but found him not guilty of assault with the intent to rape, which carries a substantially greater punishment. (Compare §§ 220, subd. (a)(2) ["punished by imprisonment in the state prison for five, seven, or nine years"] with 243.4, subd. (a) ["imprisonment in the state prison for two, three, or four years"].)[14] As the Supreme Court in *Toro* observed, in light of the "potential benefit to the defendant of affording the jury a wider range of verdict options" and "[t]o prevent speculation on a favorable verdict, a reasonable and fair rule . . . is that a failure to promptly object will be regarded as a consent to the new charge and a waiver of any objection based on lack of notice." (*Toro, supra*, 47 Cal.3d at p. 976.) We conclude such a waiver occurred here.[15]

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[14] By contrast, felony violations of section 243.4, subdivisions (a) and (d), are both punishable by imprisonment in the state prison for two, three, or four years and a fine not to exceed $10,000.

[15] However, the judgment and the abstract of judgment must be modified to reflect Ajtun's conviction of sexual battery in violation of section 243.4, subdivision (a). Accordingly, we modify the judgment and order the abstract of judgment corrected to reflect a conviction on count 4 of sexual battery in violation of section 243.4, subdivision (a).

F. *Remand Is Not Warranted for an Ability-to-pay Hearing on the Fines and Assessments Imposed by the Trial Court*

Ajtun requests in his supplemental opening brief we remand the case for the trial court to conduct a hearing on Ajtun's ability to pay the $10,000 restitution fine, the parole revocation restitution fine in the same amount, $210 in court facilities assessments, and $280 in criminal operations assessments. The People respond that Ajtun has forfeited his constitutional challenges and has not shown his inability to pay the fines and fees. The People also contend imposition of the fines and fees did not violate the excessive fines clause of the Eighth Amendment. We conclude Ajtun forfeited any challenge to the restitution fines, and any error in not providing Ajtun an ability-to-pay hearing as to the assessments was harmless because the record shows Ajtun had the ability to pay $490 in assessments.

1. Dueñas *and its progeny*

In *Dueñas*, this court concluded "the assessment provisions of Government Code section 70373 and Penal Code section 1465.8, if imposed without a determination that the defendant is able to pay, are . . . fundamentally unfair; imposing these assessments upon indigent defendants without a determination that they have the present ability to pay violates due process under both the United States Constitution and the California Constitution." (*Dueñas, supra*, 30 Cal.App.5th at p. 1168; accord, *People v. Belloso* (2019) 42 Cal.App.5th 647, 654-655 (*Belloso*),

review granted Mar. 11, 2020, S259755.)[16] In contrast to court assessments, a restitution fine under section 1202.4, subdivision (b), "is intended to be, and is recognized as, additional punishment for a crime." (*Dueñas*, at p. 1169; accord, *Belloso*, at p. 655.)[17] Section 1202.4, subdivision (c), expressly provides a

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[16] Several Courts of Appeal have applied this court's analysis in *Dueñas* (e.g., *People v. Santos* (2019) 38 Cal.App.5th 923, 929-934; *People v. Kopp* (2019) 38 Cal.App.5th 47, 95-96, review granted Nov. 13, 2019, S257844 [applying due process analysis to court assessments]; *People v. Jones* (2019) 36 Cal.App.5th 1028, 1030-1035), or partially followed *Dueñas* (e.g., *People v. Valles* (2020) 49 Cal.App.5th 156, 162-163 [concluding due process requires ability-to-pay hearing before imposition of court facilities fee, not restitution fines]). Other courts have rejected this court's due process analysis (e.g., *People v. Cota* (2020) 45 Cal.App.5th 786, 794-795; *People v. Kingston* (2019) 41 Cal.App.5th 272, 279-281; *People v. Hicks* (2019) 40 Cal.App.5th 320, 326, review granted Nov. 26, 2019, S258946), or concluded the imposition of fines and fees should be analyzed under the excessive fines clause of the Eighth Amendment (e.g., *People v. Cowan* (2020), 47 Cal.App.5th 32, 42, review granted June 17, 2020, S261952; *People v. Aviles* (2019) 39 Cal.App.5th 1055, 1061; *Kopp* at pp. 96-97 [applying excessive fines analysis to restitution fines]). The Supreme Court granted review of the decision in *Kopp* to decide the following issues: "Must a court consider a defendant's ability to pay before imposing or executing fines, fees, and assessments? If so, which party bears the burden of proof regarding defendant's inability to pay?"

[17] Our analysis of restitution fines under section 1202.4, subdivision (b), also applies to parole revocation fines under section 1202.45, because these fines must be imposed "in the same amount as that imposed pursuant to subdivision (b) of Section 1202.4." (§ 1202.45, subd. (a).)

defendant's inability to pay a restitution fine may not be considered as a "compelling and extraordinary reason" not to impose the statutory minimum fine. However, as this court held in *Dueñas*, to avoid the serious constitutional questions raised by imposition of such a fine on an indigent defendant, "although the trial court is required by . . . section 1202.4 to impose a restitution fine, the court must stay the execution of the fine until and unless the People demonstrate that the defendant has the ability to pay the fine." (*Dueñas*, at p. 1172; accord, *Belloso*, at p. 655.)

In *Belloso* we rejected the argument "a constitutional challenge to imposition of fines and fees on an indigent defendant should be analyzed under an excessive fines analysis instead of a due process framework." (*Belloso, supra*, 42 Cal.App.5th at p. 660.) We observed, "As the California Supreme Court explained in [*People ex rel. Lockyer v. R.J. Reynolds Tobacco Co.* (2005) 37 Cal.4th 707, 728], in its analysis of the constitutionality of civil penalties imposed by the trial court, 'It makes no difference whether we examine the issue as an excessive fine or a violation of due process.'" (*Ibid.*)

2. *Ajtun forfeited his challenge to imposition of the restitution fines*

The People contend Ajtun forfeited his challenge to imposition of the fines and fees because he did not assert his inability to pay at sentencing. However, at the time Ajtun was sentenced, *Dueñas* had not yet been decided, and we have declined to find forfeiture based on a defendant's failure to object to fines and fees prior to our opinion in *Dueñas*. As we explained in *People v. Castellano* (2019) 33 Cal.App.5th 485, 489, "[N]o

California court prior to *Dueñas* had held it was unconstitutional to impose fines, fees or assessments without a determination of the defendant's ability to pay. . . . When, as here, the defendant's challenge on direct appeal is based on a newly announced constitutional principle that could not reasonably have been anticipated at the time of trial, reviewing courts have declined to find forfeiture." (Accord, *Belloso, supra*, 42 Cal.App.5th at p. 662; *People v. Santos* (2019) 38 Cal.App.5th 923, 931-932; *People v. Johnson* (2019) 35 Cal.App.5th 134, 137-138 (*Johnson*); contra, *People v. Bipialaka* (2019) 34 Cal.App.5th 455, 464 [defendant forfeited challenge by not objecting to the assessments and restitution fine at sentencing]; *People v. Frandsen* (2019) 33 Cal.App.5th 1126, 1153-1154 [same].)

Although Ajtun had no basis prior to *Dueñas* to object to imposition of the assessments, he had a right to raise his inability to pay the restitution fines to the extent they exceeded the statutory minimum. (§ 1202.4, subd. (c) ["Inability to pay may be considered . . . in increasing the amount of the restitution fine in excess of the minimum fine . . . ."].) By failing to object to imposition of restitution fines exceeding the $300 statutory minimum, Ajtun forfeited his right to challenge the restitution fines on appeal. (*People v. Nelson* (2011) 51 Cal.4th 198, 227 [defendant forfeited challenge to $10,000 restitution fine imposed under § 1202.4 by failing to object at his sentencing hearing]; *People v. Taylor* (2019) 43 Cal.App.5th 390, 400-401 [defendant forfeited objection to $10,000 restitution fine]; see *People v. Aguilar* (2015) 60 Cal.4th 862, 867-868 [defendant forfeited challenge to probation-related costs and reimbursement of attorneys' fees by failing to object at sentencing].)

3. *Any error in imposing $490 in court assessments without a determination of Ajtun's ability to pay was harmless*

Even if Ajtun did not forfeit his challenge to the trial court's imposition of $210 in court facilities assessments and $280 in criminal operations assessments, any error in denying Ajtun a hearing on his ability to pay was harmless beyond a reasonable doubt.[18] (*Johnson, supra*, 35 Cal.App.5th at pp. 139-140 [even if defendant was denied due process by trial court's failure to consider his ability to pay $370 in fines and fees, any error was harmless beyond a reasonable doubt]; see *Chapman v. California* (1967) 386 U.S. 18, 24.)

Ajtun bears the burden of proof to show he was unable to pay the assessments. (*People v. Santos, supra*, 38 Cal.App.5th at p. 934; *People v. Castellano, supra*, 33 Cal.App.5th at p. 490.) Even if Ajtun had been afforded an ability-to-pay hearing, the record shows he had the ability to pay $490 in assessments. At the time of the offenses, Ajtun owned his own business and car, provided money, clothes, and food to his victims and their families, and rented hotel rooms for some of his crimes. As the

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[18] We do not reach whether Ajtun's failure to object to imposition of the restitution fine above the statutory minimum resulted in forfeiture of a challenge to the court assessments. (See *People v. Taylor, supra*, 43 Cal.App.5th at pp. 400-401 [a defendant's ability to pay the restitution fine is only one of the factors the court should consider in setting the restitution fine above the statutory minimum]; see also § 1202.4, subd. (d); contra, *People v. Frandsen, supra*, 33 Cal.App.5th at p. 1154 [defendant's failure to object to $10,000 restitution fine resulted in forfeiture of challenge to $120 in assessments based on inability to pay].)

Court of Appeal in *Johnson* observed in concluding the defendant had the ability to pay $370 in fines and assessments based on evidence he was employed as a painter and a municipal cleaner, owned a cell phone, and paid for a hotel room on the night of the offense, "These are hardly indications of wealth, but there is enough evidence in the trial record to conclude that the total amount involved here did not saddle Johnson with a financial burden anything like the inescapable, government-imposed debt trap . . . Dueñas faced." (*Johnson, supra*, 35 Cal.App.5th at p. 139.) On this record, denial of an ability-to-pay hearing as to $490 in assessments is harmless beyond a reasonable doubt. (*Chapman v. California, supra*, 386 U.S. at p. 24; *Johnson*, at p. 140.)

DISPOSITION

The judgment is modified to reflect that Ajtun's conviction on count 4 was of sexual battery in violation of section 243.4, subdivision (a). In all other respects, the judgment is affirmed. The superior court is directed to prepare a corrected abstract of judgment and to forward it to the Department of Corrections and Rehabilitation.

FEUER, J.

We concur:

PERLUSS, P. J. SEGAL, J.